

Memo Re: Rule 16.1 (1/23/17 Version)

Following the Civil Rules Committee meeting on 11/18, several additional revisions have been suggested. A number of them are fixes for some glitches in cross-references to other parts of Rules 16 and 26. Some were minor wording changes. These were run by the subcommittee and drew no objections. They are not highlighted in this latest version. Some of the proposed revisions were inspired by concerns over the phraseology of the \$100,000 exclusion, and by the handling of preservation depositions.

The following are things that we haven't discussed or resolved before.

- 1) First, a possible change for 16.1(b)(2), replacing "my claims" with "this party's claims." This suggestion arises from the use of that phrase in the revised Civil Cover Sheet, which is also attached to this document. It may provide a solution to a small but vexing problem.
- 2) Second, limiting exclusions to claims arising from "a single transaction, incident or occurrence."
- 3) A possible alternate for (d)(2) which removes the words proportional and relevant, which are more important to the scope of discovery than to whether a case is appropriate for Simplified Procedure.

The next page of this document, page 2, which was originally designed to give a brief, initial explanation of the proposed changes to the entire Rules Committee, has been changed with some significant alterations to the third paragraph suggested by Professor Mueller. I am not sure if there is any longer-run purpose for this explanation, so it may not need any discussion. However, it may be useful as part of a Comment to Rule 16.1.

We have not yet attempted to finalize a Comment to go with this revised rule, and will need to discuss how that should be handled.

Dick

**PROPOSAL FOR AMENDMENT TO RULE 16.1 (SIMPLIFIED PROCEDURE)**

(1/23/17)

Rule 16.1 was adopted a number of years ago in hopes that lawyers and parties would use it as a way to increase access to the courts and diminish the cost of litigation for cases under \$100,000. Well over 50% of the applicable civil cases filed in Colorado seek relief in amounts less than \$100,000. Utilization of Rule 16.1 is voluntary and has become primarily used for collection cases, with most other eligible cases opting out. Those lawyers who have used it and judges who have seen it operating strongly approve of it. *See Gerety, "Simplified Pretrial Procedure in the Real World Under C.R.C.P. 16.1," 40 The Colorado Lawyer 23, 25 (April 2011),*

The Colorado Supreme Court has approved a number of changes designed to improve access to justice for all civil cases, and has requested the Civil Rules Committee to consider possible changes to Rule 16.1. Based on surveys and analyses of court dockets there appear to be several articulated reasons why lawyers and parties opt out of 16.1. The primary ones are (1) the fact that the \$100,000 limit includes attorney fees; (2) voluntarily agreeing to limited discovery might expose a lawyer to malpractice claims; and (3) the Rule banned *any* depositions. (Rarely admitted are that some clients believe that using excessive discovery will force better settlements and lawyers' general distaste for anything new and different.) *See, e.g., Stuart Jorgenson, "A Rule That is Ready for Retirement," 42 The Colorado Lawyer 53 (Feb. 2013).*

The revised Rule deals with these major criticisms, and clarifies the meaning of the large case exemption and provides for limited discovery. The large case exemption applies if any one claimant seeks more than \$100,000 from any other single party in the case for damages arising from a single transaction, incident or occurrence, but it does not apply merely because the combined amounts of smaller claims by one party against one or more other parties exceed \$100,000. The revised Rule also exempts from the \$100,000 limit awards of allowable attorney fees. The revised Rule allows up to 6 hours of discovery depositions per party, in addition to preservation depositions, and the revised Rule allows each party up to five requests for production of documents. Finally and most important, the revised Rule applies to all applicable civil cases unless, upon a party's motion showing good cause, the court allows the case to proceed under the normal larger case litigation rules.

One of the additional benefits for leaving cases under Rule 16.1 is that those cases would not have to comply with the proposed requirements for filing a Proposed Case Management Order and attendance at the in-person Case Management Conference, which otherwise may increase the expense burden on the smallest of cases and which should normally be unnecessary for those cases.

**PROPOSED REVISIONS TO RULE 16.1. SIMPLIFIED PROCEDURE FOR CIVIL  
ACTIONS (12/1/16)**

**(a) Purpose of Simplified Procedure.**

The purpose of this rule, which establishes Simplified Procedure, is to provide maximum access to the district courts in civil actions; to enhance the provision of just, speedy, and inexpensive determination of civil actions; to allow earlier trials; and to limit discovery and its attendant expense.

**(b) Actions Subject to Simplified Procedure.** Simplified Procedure applies to all civil actions other than:

(1) civil actions that are class actions, domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 106 and 120, or other similar expedited proceedings, unless otherwise stipulated by the parties; or

(2) civil actions in which any one party seeks monetary judgment from any other party of more than \$100,000, exclusive of reasonable allowable attorney fees, interest and costs, as shown by a statement on the Civil Cover Sheet by the party's attorney or, if unrepresented, by the party, that "In compliance with C.R.C.P. 11, based upon information reasonably available to me at this time, I certify and believe that **this party's** claims in this case against **[at least??]** one of the other parties **arising from a single transaction incident or occurrence** have a fair expectation of being in excess of \$100,000."

**(c) Civil Cover Sheet.** Each pleading containing an initial claim for relief in a civil action, other than class actions, domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 106 and 120 shall be accompanied at the time of filing by a completed Civil Cover Sheet in the form and content of Appendix to Chapters 1 to 17, Form 1.2 (JDF 601). Failure to file the Civil Cover Sheet shall not be considered a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.

**(d) Motion for Exclusion from Simplified Procedure.** Simplified Procedure shall apply unless, no later than 42 days after the case is at issue as defined in C.R.C.P. 16(b)(1), any party files a motion, signed by both the party and its counsel, if any, establishing good cause to exclude the case from the application of Simplified Procedure.

(1) Good cause shall be established and the motion shall be granted if a defending party files a statement by its attorney or, if unrepresented, by the party, that "In compliance with C.R.C.P. 11, based upon information reasonably available to me at this time, I certify and believe that claims in this case against **[at least?]** one of the parties **arising from a single transaction, incident or occurrence** have a fair expectation of being in excess of \$100,000;" or

(2) The trial court, in its discretion, may determine other good cause for exclusion, considering factors such as the complexity of the case, the importance of the issues at stake, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of proposed discovery outweighs its likely benefit.

**(e) Election for Inclusion Under this Rule.** In actions excluded from Simplified Procedure by subsection (b)(2), within 42 days after the case is at issue, as defined in C.R.C.P. 16(b)(1), the parties may file a stipulation to be governed by this Rule.

**(f) Case Management Orders.** In actions subject to Simplified Procedure, the case management order requirements of C.R.C.P. 16(b)(2), (3) and (7) shall apply, except that preparing and filing a Proposed Case Management Order is not required.

**(g) Trial Setting.** No later than 42 days after the case is at issue, the responsible attorney shall set the case for trial pursuant to C.R.C.P. 121, section 1-6, unless otherwise ordered by the court.

**(h) Certificate of Compliance.** No later than 49 days after the case is at issue, the responsible attorney shall file a Certificate of Compliance stating that the parties have complied with all the requirements of sections (f), (g) and (k)(1) of this Rule or, if the parties have not complied with each requirement, shall identify the requirements which have not been fulfilled and set forth any reasons for the failure to comply.

**(i) Expedited Trials.** Trial settings, motions and trials in actions subject to Simplified Procedure should be given early trial settings, hearings on motions and trials, if possible.

**(j) Case Management Conference.** If any party believes that it would be helpful to conduct a case management conference, a notice to set a case management conference shall be filed stating the reasons why such a conference is requested. If any party is unrepresented or if the court determines that such a conference should be held, the court shall set a case management conference. The conference may be conducted by telephone.

**(k) Simplified Procedure.** Cases subject to Simplified Procedure shall not be subject to C.R.C.P. 16, 26-27, 31, 33 and 36, unless otherwise specifically provided in this Rule, and shall be subject to the following requirements:

**(l) Required Disclosures.**

**(A) Disclosures in All Cases.** Each party shall make disclosures pursuant to C.R.C.P. 26(a)(1), 26(a)(4), 26(b)(5), 26(c), 26(e) and 26(g) no later than 28 days after the case is at issue as defined in C.R.C.P. 16(b)(1). In addition to the requirements of C.R.C.P. 26(g), the disclosing party shall sign all disclosures under oath.

**(B) Additional Disclosures in Certain Actions.** Even if not otherwise required under subsection (A), matters to be disclosed pursuant to this Rule shall also include, but are not limited to, the following:

**(I) Personal Injury Actions.** In actions claiming damages for personal or emotional injuries, the claimant shall disclose the names and addresses of all doctors, hospitals, clinics, pharmacies and other health care providers utilized by the claimant within five years prior to the date of injury who

or which provided services which are related to the injuries and damages claimed, and shall produce all records from those providers or written waivers allowing the opposing party to obtain those records, subject to appropriate protective provisions obtained pursuant to C.R.C.P. 26(c). The claimant shall also produce transcripts or tapes of recorded statements, documents, photographs, and video and other recorded images that address the facts of the case or the injuries sustained. The defending party shall disclose transcripts or tapes of recorded statements, any insurance company claims memos or documents, photographs, and video and other recorded images that address the facts of the case, the injuries sustained, or affirmative defenses. A party need not produce those specific records for which the party, after consultation pursuant to C.R.C.P. 26(c), timely moves for a protective order from the court.

**(II) Employment Actions.** In actions seeking damages for loss of employment, the claimant shall disclose the names and addresses of all persons by whom the claimant has been employed for the ten years prior to the date of disclosure, and shall produce all documents which reflect or reference the claimant's efforts to find employment since the claimant's departure from the defending party, and written waivers allowing the defending party to obtain the claimant's personnel files and payment histories from each employer, except with respect to those records for which the claimant, after consultation pursuant to C.R.C.P. 26(c), timely moves for a protective order from the court. The defending party shall produce the claimant's personnel file and applicable personnel policies and employee handbooks.

**(C) Document Disclosure.** Documents and other evidentiary materials disclosed pursuant to C.R.C.P. 16.1(k)(1)(B) and 26(a)(1) shall be made immediately available for inspection and copying to the extent not privileged or protected from disclosure.

**(2) Disclosure of Expert Witnesses.** The provisions of C.R.C.P. 26(a)(2)(A) and (B), 26(a)(4), 26(b)(4), 26(b)(5), 26(c), 26(e) and 26(g) shall apply to disclosure of expert witnesses. Written disclosures of experts shall be served by parties asserting claims 91 days (13 weeks) before trial; by parties defending against claims 63 days (9 weeks) before trial; and parties asserting claims shall serve written disclosures for any rebuttal experts 49 days before trial. The parties shall be limited to one expert witness per side retained pursuant to C.R.C.P. 26(a)(2)(B)(I), unless the trial court authorizes more for good cause shown.

**(3) Mandatory Disclosure of Trial Testimony.** Each party shall serve written disclosure statements identifying the name, address, telephone number, and a detailed statement of the expected testimony for each witness the party intends to call at trial whose deposition has not been taken, and for whom expert reports pursuant to subparagraph (k)(2) of this Rule have not been provided. For adverse party or hostile witnesses a party intends to call at trial, written disclosure of the expected subject matters of the witness' testimony, rather than a detailed statement of the expected testimony, shall be sufficient. Written disclosure shall be served by parties asserting claims 91 days (13 weeks) before trial; by parties defending against claims 63 days (9 weeks) before trial; and parties asserting claims shall serve written disclosures for any rebuttal witnesses 49 days before trial.

**(4) Permitted Discovery.** The following discovery is permitted, to the extent allowed by C.R.C.P. 26(b)(1):

(I) Each party may take a combined total of not more than six hours of depositions noticed by the party;

(II) Not more than five requests for production of documents may be served by each party; and

(III) The parties may request discovery pursuant to C.R.C.P. 34(a)(2) (inspection of property) and C.R.C.P. 35 (medical examinations).

**(5) Depositions for Obtaining Documents and for Trial.** In addition to depositions allowed under subsection (k)(4)(I) of this Rule:

(I) Depositions may be taken for the sole purpose of obtaining and authenticating documents from a non-party; and

(II) A party who intends to offer the testimony of an expert or other witness may, pursuant to C.R.C.P. 30(b)(1)-(4) and (7), take the deposition of that witness for the purpose of preserving the witness' testimony for use at trial without being subject to the six-hour limit on depositions in subsection (k)(4)(I) of this Rule. **Unless authorized by the court or stipulated by the parties, a preservation deposition is limited to one day of 6 hours.[??]** Such a deposition shall be taken at least 7 days before trial. In that event, any party may offer admissible portions of the witness' deposition, including any cross-examination during the deposition, without a showing of the witness' unavailability. Any witness who has been so deposed may not be offered as a witness to present live testimony at trial by the party taking the preservation deposition.

**(6) Trial Exhibits.** All exhibits to be used at trial which are in the possession, custody or control of the parties shall be identified and exchanged by the parties at least 35 days before trial. Authenticity of all identified and exchanged exhibits shall be deemed admitted unless objected to in writing within 14 days after receipt of the exhibits. Documents in the possession, custody and control of third persons that have not been obtained by the identifying party pursuant to document deposition or otherwise, to the extent possible, shall be identified 35 days before trial and objections to the authenticity of those documents may be made at any time prior to their admission into evidence.

**(7) Limitations on Witnesses and Exhibits at Trial.** In addition to the sanctions under C.R.C.P. 37(c), witnesses and expert witnesses whose depositions have not been taken shall be limited to testifying on direct examination about matters disclosed in reasonable detail in the written disclosures, provided, however, that adverse parties and hostile witnesses shall be limited to testifying on direct examination to the subject matters disclosed pursuant to subparagraph (k)(3) of this Rule. However, a party may call witnesses for whom written disclosures were not previously made for the purpose of authenticating exhibits if the opposing party made a timely objection to the authenticity of such exhibits specifying the factual issues concerning the authenticity of the exhibits.

**(8) Juror Notebooks and Jury Instructions.** Counsel for each party shall confer about items to be included in juror notebooks as set forth in C.R.C.P. 47(t). At the beginning of trial or at such other date set by the court, the parties shall make a joint submission to the court of items to be included in the juror notebook. Jury instructions and verdict forms shall be prepared pursuant to C.R.C.P. 16(g).

**(I) Changed Circumstances.** In a case under Simplified Procedure, any time prior to trial, upon a specific showing of substantially changed circumstances sufficient to render the application of Simplified Procedure unfair and a showing of good cause for the timing of the motion to terminate, the court shall terminate application of Simplified Procedure and enter such orders as are appropriate under the circumstances. Except in cases under subsection (e) of this Rule, if any party discloses damages against a single party in excess of \$100,000 – including actual damages, penalties and punitive damages, but excluding allowable attorney fees, interest and costs – arising from a single transaction, incident or occurrence, the opposing party may move to have the case removed from Simplified Procedure and the motion shall be granted unless the claiming party stipulates to a limitation of damages against the opposing party, excluding allowable attorney fees, interest and costs, of \$100,000. The stipulation must be signed by the claiming party and, if the claiming party is represented, by the claiming party’s attorney.

**FORM 1.2. DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT AND JURY DEMAND**

District Court _____ County, Colorado Court Address:  <hr/> Plaintiff(s): v. Defendant(s):	<b>▲ COURT USE ONLY ▲</b>
Attorney or Party Without Attorney (Name and Address):   Phone Number: _____ E-mail: _____ FAX Number: _____ Atty. Reg. #: _____	Case Number:
<b>DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT AND JURY DEMAND</b>	

1. This cover sheet shall be filed with the initial pleading of a complaint, counterclaim, cross-claim or third party complaint in every district court civil (CV) case. It shall not be filed in Domestic Relations (DR), Probate (PR), Water (CW), Juvenile (JA, JR, JD, JV), or Mental Health (MH) cases. Failure to file this cover sheet is not a jurisdictional defect in the pleading by may result in a clerk’s show cause order requiring its filing.
  
2. Simplified Procedure under C.R.C.P. 16.1 **applies** to this case **unless** (check one box below if this party asserts that C.R.C.P. 16.1 **does not** apply):
  - This is a class action, forcible entry and detainer, Rule 106, Rule 120, or other similar expedited proceeding, **or**
  - This party is seeking a monetary judgment against another party for more than \$100,000.00, including any penalties or punitive damages, but excluding attorney fees, interest and costs, as supported by the following certification:
 

By my signature below and in compliance with C.R.C.P. 11, based upon information reasonably available to me at this time, I certify and believe that this party’s claims in this case against [at least ??] one of the other parties arising from a single transaction, incident or occurrence have a fair expectation of being in excess of \$100,000.
  - or**
  - Another party has previously filed a cover sheet stating that C.R.C.P. 16.1 does not apply to this case.
  
3.  This party makes a **Jury Demand** at this time and pays the requisite fee. See C.R.C.P. 38. (Checking this box is optional.)

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of Party or Attorney for Party

**NOTICE**

This cover sheet must be served on all other parties along with the initial pleading of a complaint, counterclaim, cross-claim, or third party complaint.

**JDF 601 \_\_/17** DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT AND JURY DEMAND